



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 334 of 2007**

**TEWOLDE KIDANE .....1<sup>ST</sup> APPELLANT**  
**ELIJAH KIBINDU NYAGA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MOHAMED JIDALE (Personal representative of the estate of**  
**FAWAZ MOHAMED JIDALE).....RESPONDENT**

**RULING**

1. There are two applications before me. The 1<sup>st</sup> one is a notice of motion dated 12<sup>th</sup> November, 2009 in which Tewolde Kidane and Elijah Kibindu Nyaga (hereinafter referred to as the appellants) seek to have their appeal reinstated under Order XLI Rule 16 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.
2. The 2<sup>nd</sup> application is a notice of motion dated 20<sup>th</sup> November, 2009 brought under Section 3A of the Civil Procedure Act, in which the respondent Mohamed Jidale who is the personal representative of Fawaz Mohamed Jidale seeks an order that the sum of Kshs.645,150/= deposited in a fixed joint interest account with Prime Bank in the name of the parties' advocate be released to the respondent's advocates, together with all the accrued interest.
3. The respondent's application is anchored on the fact that the appeal having been dismissed on 27<sup>th</sup> October, 2009, the order for stay of execution is spent and the respondent should therefore be allowed to access the funds which were deposited in a joint interest earning account.
4. It is apparent from the above that if the appellants' motion is determined in the appellant's favour, the respondent's application for release of the money deposited in the interest earning account will have been pre-empted.
5. Mr. Modi who is the advocate for the appellants, has sworn an affidavit in which he has endeavored to explain why there was no attendance on 27<sup>th</sup> October, 2009 when the appeal was dismissed. Mr. Modi's affidavit is based on information from one Mrs. Kimotho, whom he claims was handling the matter. There is no reason given as to why, the said Mrs. Kimotho has not sworn the affidavit by herself. Interestingly, Mrs. Kimotho was the one who attended this court and prosecuted the appellant's notice of motion.
6. Under Order XVIII Rule 3(1) of the Civil Procedure Rules, an affidavit is required to be confined to such facts as the deponent is able of his own knowledge to prove. There are two exceptions to that requirement. These are, where leave of the court has been obtained or during interlocutory proceedings. In such a situation, an affidavit may contain statement of information and belief, showing the sources and grounds relied upon. Neither of the two exceptions is applicable herein. Therefore the affidavit sworn by Kennedy Modi is incompetent to explain why there was no appearance for the hearing of the appeal. Nor can the statement from the bar made by Mrs. Kimotho cure the position. The result is that the appellants have not satisfied this court that the failure to attend court on 27<sup>th</sup> October, 2009 was due to an excusable mistake or that the appellants were prevented from attending court due to sufficient cause.
7. Mr. Modi has talked of an order which was issued on 16<sup>th</sup> March, 2009 staying all proceedings against Standard Assurance (K) Ltd or its policy holders during the currency of a moratorium declared by the statutory manager on 11<sup>th</sup> March, 2009. However, there is nothing on the face of the record to show that Standard Assurance (K) Ltd had any interest in this particular appeal or that the order referred to is applicable to the current proceedings. Moreover, the respondent's suit was filed in the year 2003. The

judgment in the lower court which was subject of the appeal was delivered on 26<sup>th</sup> April, 2007. Further delay of the finalization of this matter due to events occurring in 2009 is not justified. There has to be an end to litigation.

8. I find that the appellants have not satisfied this court that their absence on 27<sup>th</sup> October, 2009, was excusable, nor have the appellants laid any basis for this court exercising its discretion in the appellants' favour. Moreover, the appellants' notice of motion is defective as the appellants have not sought to have the order of dismissal set aside, or the appeal re-admitted, but have merely sought to have their appeal reinstated. For the above reasons, I come to the conclusion that the appellants' notice of motion must fail.
9. As regards the respondent's motion for release of the amount deposited in the fixed joint interest earning account, to the respondent's counsel, the money was deposited into a joint interest earning account, pursuant to orders granted by this court on 17<sup>th</sup> July, 2007. By a consent recorded by the parties on 8<sup>th</sup> October, 2007, it was agreed that the money be retained in the joint interest earning account pending the hearing and determination of the appeal. The appeal having been disposed off, the order for stay of execution is spent and there is no reason why the respondent should be delayed any further from accessing the benefits of its litigation.
10. The appellants' counsel claimed that his client is under statutory management. That may well be so. However, the money deposited in the interest earning account having been deposited as security in respect of this particular appeal, it is not affected by the status of the appellants. I therefore grant the respondent's motion and order that the sum of Kshs.645,150/= Shall be forthwith released to the respondent's counsel. Then appellant's motion dated 12<sup>th</sup> November 2009 is dismissed.

**Dated and delivered this 15<sup>th</sup> day of March, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Ms Kimata for the appellant

Ms Gulenywa for the respondent

Eric - Court clerk